

## MEMORANDUM OF LAW

DATE: June 25, 1993

TO: Councilmember Juan Vargas

FROM: City Attorney

SUBJECT: Legality of "District Eight Graffiti Buster" Title

On May 5, 1993, you sent a memorandum to our office asking us to investigate the legality of District 8 using the title "District Eight Graffiti Buster" for its graffiti abatement program ("program"). It appears the slogan would be placed on the car that is used by your staff assistant in charge of removing graffiti. Our recommendation would be to call the County Recorder to determine whether a business has properly obtained and filed the required fictitious business name statement ("statement"). If a statement has been filed then another name is needed for the program. If a statement has not been filed, then filing a statement would put individuals and business entities on notice that such a name, for commercial purposes, would not be available.

### STATUTES

The use of fictitious business names is regulated by California Business & Professions Code ("B&P Code"). B&P section 17900 states, in part:

Section 17900. "Fictitious business name"

(a) As used in this chapter, "fictitious business name" means:

- (1) In the case of an individual, a name that does not include the surname of the individual or a name that suggests the existence of additional owners.
- (2) In the case of a partnership or other association of persons, other than a limited partnership which has filed a certificate of limited partnership with the Secretary of State pursuant to Section 15621 of the Corporations Code, or a foreign limited partnership which has filed an application for registration with the Secretary of State pursuant to section 15692 of the Corporations Code, a name that does not include the surname of each general

partner or a name that suggests the existence of additional owners.

(3) In the case of a corporation, any name other than the corporate name stated in its articles of incorporation.

The requirements for the filing of a statement is found in B&P Code sections 17910 and 17911 which provide:

Section 17910. Time for filing statement

Every person who regularly transacts business in this state for profit under a fictitious business name shall:

(a) file a fictitious business name statement in accordance with this chapter not later than 40 days from the time he commences to transact such business; and

(b) file a new statement in accordance with this chapter on or before the date of expiration of the statement on file (emphasis added).

Section 17911. Nonprofit corporations

This chapter does not apply to a nonprofit corporation or association, including, but not limited to, organizations such as churches, labor unions, fraternal and charitable organizations, nonprofit hospitals, and similar organizations.

Since the "Graffiti Buster" abatement program of District 8 is not transacting business for profit and is in essence a nonprofit organization, filing a statement is not required. On the other hand, filing a statement, although not required, would provide notice that "Graffiti Buster" is being used by District 8 and perhaps prevent frivolous lawsuits.

However, an individual, partnership, or corporation required to file a statement may acquire a legal right to use the name "Graffiti Buster" if it has properly filed the statement.

B&P Code section 14411 indicates that:

Section 14411. Presumption applicable to fictitious business name statement

The filing of any fictitious business name statement by a person required to file such statement pursuant to Section 17910 shall establish a rebuttable presumption that the registrant has the exclusive right to use as a trade name the fictitious business name, as well as any confusingly similar trade name, in the county in which the statement is filed, if the

registrant is the first to file such a statement containing the fictitious business name in that county, and is actually engaged in a trade or business utilizing such fictitious business name or a confusingly similar name in that county (emphasis added). . . .

Pursuant to B&P Code section 14411, if a business properly filed a statement, it would have a rebuttable presumption for the exclusive right to use the registered trade name. In addition, it would also have the presumption as it relates to confusing similar trade names. Consequently, if an industry properly filed pursuant to B&P Code section 17910 using the name "Graffiti Buster", it would arguably have a rebuttable presumption for the exclusive right to use or prevent the use of "District Eight Graffiti Buster."

#### CASE LAW

The use of fictitious business names has been litigated and California courts have held that,

It is the policy of the law to protect the business of the first person to enter the field doing business under a given name . . . . A second to enter the field may be enjoined from the improper use of the name established by the first to enter the field . . . . It is not necessary for the plaintiff to prove fraudulent intent. The defendants may be enjoined if the natural consequence of their conduct is such as to cause deception. Hoover Co. v. Groger, 12 Cal.App.2d 417, 419 (1936).

As it relates to requesting monetary damages, courts have held that "in order to recover damages, plaintiffs must prove as an essential element of their cause of action that defendant copied the title . . . with the intent to deceive the public . . . ." Tomlin v. Walt Disney Productions, 18 Cal.App.3d 226, 234 (1971). Obviously, using the name "District Eight Graffiti Buster" is not intended to deceive the public. Consequently, even assuming that a statement has been properly filed and the City decides to use the registered name regardless, the City would probably not be liable for monetary damages.

#### CONCLUSION

Although District 8 is not in the graffiti abatement business for profit, and certainly has no interest to defraud the public through use of the term "Graffiti Buster", an individual or business may have a legal right to use that name or its

exclusive trade name if it has properly filed a statement. It is our recommendation that District 8 call the County Recorder at 237-5230 prior to adopting the "District Eight Graffiti Buster" as the name of its program. If a statement has been filed, then another name is needed for the program. If a statement has not been filed, then file a statement to obtain a presumptive exclusive right to use the chosen name. Again, even though the City is not required to file a statement, it would perhaps prevent the filing of frivolous lawsuits over who has exclusive right to use the trade name.

Don't hesitate to call if you have further questions regarding this issue.

JOHN W. WITT, City Attorney

By

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